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North Dakota Products Liability Law: A Litigator's Guide

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NORTH DAKOTA PRODUCTS LIABILITY LAW: A LITIGATOR'S GUIDE

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I. INTRODUCTION

The North Dakota Supreme Court has observed that "strict liability for products has developed as a highly specialized body of law."[1] This specialized body of law is added to the law the trial attorney should know regarding liability for products because of negligence, warranty and misrepresentation.

This article is intended to be a quick guide to North Dakota products liability law, and to provide comments on emerging developments. This article assumes the reader has a basic understanding of products liability law. It discusses the most significant case law in North Dakota products liability.

II. STRICT LIABILITY THEORY CONTRASTED WITH NEGLIGENCE THEORY

Four generations ago, when a product injured a consumer, the lawyer thought first of warranty or misrepresentation law.[2] The basic question the lawyer investigated was what promises had been made by the seller of the goods to the buyer.[3] Developments in the law during the last fifty years have changed what a lawyer needs to consider.

Two generations ago, when a product accident occurred, the lawyer thought first of negligence law.[4] The basic question he investigated was whether the manufacturer had acted reasonably in his design, construction, and warnings before putting the product into the hands of the consumer.[5]

In contrast, when a consumer is injured, today's lawyer thinks first of strict liability.[6] Moreover, the attorney's thoughts will turn to the differences of recovery under strict liability theory, as distin-

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1. Jacobs v. Anderson Building Co., 459 N.W.2d 384, 388 (N.D. 1990).

2. *See generally* Prosser, *The Assault on the Citadel*, 69 YALE L.J. 1099 (1960).

3. *E.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913)(discussing implied warranty from seller to buyer).

4. *See generally* Prosser, *supra* note 2.

5. *See generally* Rheingold, *The Expanding Liability of the Products Supplier: A Primer*, 2 HOFSTRA L. REV. 521 (1974).

6. *See generally* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

guished from the negligence theory. To understand the choices that the lawyer, and the judge, must make in handling a products liability suit today, we must review negligence theory and contrast it with strict liability theory.

When a North Dakota jury is charged to determine whether negligence exists, it usually is instructed:

> "Ordinary negligence" is the lack of ordinary care and diligence required by the circumstances. Ordinary care or diligence means such care as a person of ordinary prudence usually exercises about his own affairs of ordinary importance.
>
> Negligence involves a lack of such concern for the probable consequences of an act or failure to act as a person of ordinary prudence would have had in conducting his affairs. It is the lack of such care as persons of common sense and ordinary prudence usually exercise under the same or similar circumstances.[7]

In contrast to the negligence instruction, the rule regarding strict liability states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[8]

The rules of negligence and strict liability are stated simply; the problem is in their application. The usual definition of strict product liability says nothing about a community standard or

7. North Dakota Pattern Jury Instructions, NDJI-Civil 105 (1986).
8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

about the need for a manufacturer to use reasonable care. Yet the application of strict liability theory in a trial, like the application of negligence theory, actually involves a community standard of care. To understand why a community standard is involved, we first focus on some frequently cited North Dakota cases.

Johnson v. American Motors Corp.[9] adopted the doctrine of strict product liability set out in the Restatement of Torts (Second) Section 402A.[10] *Johnson* then proceeded to discuss what in the court's view this doctrine required when applied to the case before it (a case where the consumer, instead of a product defect, caused the accident). The court concluded that the doctrine of strict liability requires that the manufacturer protect the user against the foreseeable misuse of its products.[11]

Enter the community standard! If the auto manufacturer must guard against accidents not of the manufacturer's cause, which accidents must the manufacturer guard against? The jury — the community — must make the decision.

This requirement of "unreasonableness" in the product is underlined in *Kaufman v. Meditec, Inc.*[12] In *Kaufman*, the court found that the 1985 version of the Pattern Jury Instruction on products liability was insufficient because it did not contain the statutory definition of "unreasonably dangerous."[13] In short, the requirement of "unreasonable danger" is an integral part of the strict liability doctrine in North Dakota. The product is not defective unless it is "unreasonably" dangerous for the user.[14]

Now we have it: "unreasonableness" has crept back into the strict liability doctrine. But the unreasonableness now is not judged on a standard involving actions of a *person*; it is judged on a community standard involving the *product*.

This distinction between judging the product instead of the person was emphasized by the court in *Mauch v. Manufacturers Sales and Service.*[15] *Mauch* gave instructions to the trial court that the strict liability doctrine, which places emphasis on the product,

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9. 225 N.W.2d 57 (N.D. 1974).

10. Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974).

11. *Id.* at 65.

12. 353 N.W.2d 297 (N.D. 1984).

13. Kaufman v. Medite, Inc., 353 N.W.2d 297, 300-01 (N.D. 1974). *See* N.D. CENT. CODE § 28-01.1-05(2) (Supp. 1989) (defining "unreasonably dangerous" as dangerous beyond the expectation of the buyer).

14. *Kaufman*, 353 N.W.2d at 300. *See also* Wilson v. General Motors Corp., 311 N.W.2d 10 (N.D. 1981), which first stated the requirement of "unreasonable danger" as an integral part of the strict liability doctrine in North Dakota.

15. 345 N.W.2d 338 (N.D. 1984).

makes the degree of care exercised by either the plaintiff or by the manufacturer irrelevant.[16] Therefore, the manufacturer is not allowed to defend against a strict liability theory upon the ground that it was free of negligence. In like manner the plaintiff's conduct should not be scrutinized in the product liability claim.[17]

The North Dakota Supreme Court has given us law that reflects the changing view of society. In a simpler day, ideas of justice in the United States were almost exclusively founded on a general sense of a natural law theory of action: act unto others as you want them to act unto you.[18] Society has replaced this natural law theory with a civil rights theory that certain "rights" exist independently of action by persons: people have a "right" to be free of certain types of injury, irrespective of who caused the injury or the reason why the person acted.[19] Civil rights theory now provides the same mainspring of legal development that natural law theory once did. Understanding that philosophical point allows us to give a framework to what otherwise appears as confusion in products law.

Let us catalog some products liability cases that are most frequently cited in briefs to trial courts. As we do so, note how the philosophical standard of an independent right to good products (strict liability) differs from the negligence standard of action.

In *Bismarck Baptist Church v. Wiedmann Industries*,[20] a negligence case, the court stated:

> negligence is never presumed merely from proof of the happening of an accident, but such negligence must be affirmatively established. . . .
>
> . . .
>
> . . . if from the plaintiff's evidence it is equally probable that damage resulted from a cause for which the defendant *actions* would *not* be responsible: then a prima facie case of proximate cause has not been made and plaintiff

16. Mauch v. Manufacturers Sales and Service, 345 N.W.2d 338 (N.D. 1974).

17. *Id.* at 340. However, this part of Mauch was legislatively overruled in 1987. The North Dakota legislature defined "fault" as follows:

> . . . acts or omissions that are in any measure negligent or reckless towards the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, breach of warranty, negligence, or assumption of risk, misuse of product . . . failure to exercise reasonable care to avoid an injury or mitigate damages.

N.D. CENT. CODE 32-03.2-01 (1987).

18. *See Luke* 6:31 ("And as you wish that men would do to you, do so to them").

19. *See generally* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

20. 201 N.W.2d 434 (N.D. 1972).

cannot recover.[21]

In contrast, the court in *Herman v. General Irrigation Co.*,[22] a products liability case, stated:

> [t]he nature of the defect need not be precisely established, especially if a complex product is involved. A defect may be inferred from proof that the product did not perform as intended. . . .[23]

The North Dakota Supreme Court is on solid ground in allowing the mere fact of malfunction to be prima facie evidence of a defect even though a mere malfunction is not evidence of negligence. A number of courts outside of North Dakota have held that the plaintiff only need prove that a product has malfunctioned during normal operation; evidence of malfunction gives rise to an inference of product defect, establishing a prima facie case for jury consideration.[24] Of course, along with the evidence of malfunction, some evidence by the plaintiff must be shown that negates abnormal use and eliminates other causes of the accident.[25]

Even though a product is not defective under the community negligence standard of what the product should be, the manufacturer may be negligent in performance of a contract requirement to manufacture a defect free product. For example, in *Layman v. Braunschweigische Maschinenbauanstalt, Inc.*,[26] the North Dakota Supreme Court stated:

> The duty to protect another from injury . . . may arise out of . . . contract. . . . The mere breach of a contract does not, by itself, furnish a basis for liability in tort for negligence; however, negligent conduct may be involved in the breach of a contract or, even if there has been no breach of contract, liability in tort for negligence may arise because of injury to persons resulting from negligence in the course of the performance of the contract. . . .
>
> When one undertakes by contract to perform a cer-

21. Bismarck Baptist Church v. Wiedmann Indus., 201 N.W.2d 434, 440 (N.D. 1972).
22. 247 N.W.2d 472 (N.D. 1976).
23. Herman v. General Irrigation Co., 247 N.W.2d 472, 474 (N.D. 1976).
24. *See, e.g.*, Greco v. Buccioconi County Buccioconi Eng'g Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969)(stating that plaintiff need only prove product malfunction to give inference of product defect). *See also* Annotation, *Strict Products Liability: Product Malfunction or Occurrence of Accident as Evidence of Defect*, 65 A.L.R. 346 § 2 (1988).
25. *Herman*, 247 N.W.2d at 474.
26. 343 N.W.2d 334 (N.D. 1983).

> tain service [negligently fails to do so, and causes injury]; the injured person has a right of action against the offending contractor which is not based on any contractual obligation but rather on the failure of the contractor to exercise due care in the performance of his assumed obligation.[27]

The community standard for a defective product of manufacture and the standard for negligence may be combined in yet another way: the negligent act of a retailer may be used to reach the manufacturer under strict liability law. In *Foremost Insurance Company v. Rollohome Corp.*,[28] the court stated that a manufacturer who delegates tasks of an inherently dangerous nature to an independent contractor is not insulated from liability because of negligence of the independent contractor in performing the tasks, such as the assembly of a product that is dangerous if not properly assembled.[29] In such instances the manufacturer is liable for the defects in the product and for the negligence of the independent contractor.[30]

A "dealer" can be held by the jury to be an agent of a manufacturer if the dealer: was a part-time vendor of the manufacturer's products (among others); was a warranty service agent for the manufacturer; was listed as an authorized service agent for the manufacturer; made warranty calls and billed warranty work on such calls to the manufacturer; received free service materials from the manufacturer; and was instructed to call the manufacturer for assistance on service calls.[31] If the dealer is the "agent" of the manufacturer, then the manufacturer in effect will be liable under strict liability for a defect caused by the dealer's negligence.[32]

This catalog of the products lawyer's oft-cited products cases would not be complete without mention of *Keller v. Vermeer Manufacturing Co.*[33] The *Keller* court stated that the doctrine of momentary forgetfulness is applicable in cases of product liability. Further, "testimony of an absence of thought warrants an instruction [on momentary forgetfulness], as does testimony of momen-

27. Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 340-41 (N.D. 1983) (citation omitted).
28. 221 N.W.2d 722 (N.D. 1974).
29. Foremost Ins. Co. v. Rollohome Corp., 221 N.W.2d 722, 727 (N.D. 1974).
30. *Id.*
31. *Id.* at 726.
32. *Id.*
33. 360 N.W.2d 502 (N.D. 1984).

tary forgetfulness [itself]."[34] The doctrine of momentary forgetfulness is that a "reasonable man . . . does not possess a perfect memory, is not perfectly attentive, and is not infallible. Thus, in appropriate cases, the judges can instruct on forgetfulness or lack of thought [for the jury to consider]."[35]

These cases put into capsule form much of the North Dakota products liability law. If you know these cases well, you are on firm ground in a battle involving a product.

There is one further point that must be understood to try a products case in North Dakota. A jury must be instructed, in products cases occurring before 1987, on both strict liability and negligence theories. This is the effect of *Hoerr v. Northfield Foundry & Machine Co.*;[36] *Butz v. Werner*;[37] and *Mauch v. Manufacturers Sales & Service, Inc.*.[38] *Hoerr* states it distinctly: if a defendant is liable under both strict liability and negligence theories, plaintiff is entitled to judgment on the theory that affords the *greatest* recovery.[39] *Hoerr* quoted with approval a New Jersey case which says plaintiff is *entitled* to "judgment on the theory which affords the greatest recovery."[40] *Hoerr* also cited the *Mauch* case, in which plaintiff wanted both theories going to the jury; the trial court submitted only one theory (chosen by the trial court) to the jury; the supreme court reversed.[41] An implication of the language used in the *Hoerr* case was that plaintiff does not have to make an election before the case goes to the jury. *Butz* made it explicit: separate jury verdict forms must be given to the jury, so that plaintiff can elect, *after* the verdict, which theory he will take for judgment.[42]

Hoerr, *Butz*, and *Mauch* involved accidents before 1987. In 1987, the legislature enacted North Dakota Century Code sections 32-03.2-01 and 03.[43] These statutes direct that *negligence* of the plaintiff *should be compared* to the strict products liability "fault" of the manufacturer. The statute contradicts the North Dakota case law which kept separate the jury instructions and findings

34. Keller v. Vermeer Mfg. Co., 360 N.W.2d 502, 504 (N.D. 1984).

35. *Id.* at 507. Erickson v. Schwan, 453 N.W.2d 767 (N.D. 1990) held that this instruction can only be given if the injured person survives to testify that he momentarily forgot the instruction.

36. 376 N.W.2d 323 (N.D. 1985).

37. 438 N.W.2d 509 (N.D. 1989).

38. 345 N.W.2d 338 (N.D. 1984).

39. Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323, 328 (N.D. 1985).

40. *Id.* (citing Mowery v. Fantastic Homes, Inc., 568 S.W.2d 171, 173 (Tex. Civ. App. 1978)).

41. *Id.* at 327.

42. Butz v. Werner, 438 N.W.2d 509, 515-16 (N.D. 1989).

43. N.D. CENT. CODE §§ 32-03.2-01, 03 (1987).

regarding strict liability and those regarding negligence.[44]

Thus, the legislature appears, in effect, to have overruled the theory used by the North Dakota Supreme Court. It is now appropriate for the court to combine the fault assessment of strict liability and negligence in jury instructions and verdict forms in product warning cases. However, the North Dakota Supreme Court has judges with firmly held positions. They have avoided telling the trial courts what effect North Dakota Century Code section 32-03.2-03 will have on the court's theory of difference in products warning cases.[45] This past reluctance of the North Dakota court to embrace the now legislatively enacted theory may make North Dakota Century Code section 32-03.2-03 less than it seems.

In the "real world of trial," attorneys should not forget the community standards involved in both negligence and strict liability. Although the court has ignored it to date, there is a real community standard of reasonableness involved in the "defect" of a product. The legislature by demanding combined fault assessments is trying to tell the court to explicitly use the community standard of "reasonableness." Lawyers who forget the community standards lose sight of what they must tell the jury to impel the jury to act as the advocate wants.

III. WARNINGS AND INSTRUCTIONS

The historical force in the development of products liability law has been the existence of manufacturing defects and design defects. Such defects are rarely litigated today. Perhaps products in general are subject to better manufacturing and design safeguards. Rather, most products cases now involve a claim of inadequate warning.[46] Plaintiffs now often find it is difficult to label a socially desirable machine defective because of design choices; it is far easier to find, by hindsight, that a specific warning would have prevented the conduct that merged with the machine to cause the

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44. 438 N.W.2d at 515-16. In *Butz*, the North Dakota Supreme Court stated:

> A combined fault assessment form would effectively require comparison of the defendant's strict liability with the plaintiff's ordinary negligence, which . . . is not legal fault under a strict products liability claim. The result could be to improperly diminish or alter the recovery which the plaintiff would have been entitled to under separate fault assessments.

Id.

45. *Id.* at 516, n.4.

46. *See generally* Keeton, *Products Liability — Inadequacy of Information* 48 TEX. L. REV. 398 (1970); Kidwell, *The Duty to Warn: A Description of the Model of Decision*, 53 TEX. L. REV. 1375 (1975).

accident.[47]

Notice—because we will later discuss it—that warnings involve the merging of an actor's *conduct* with a product's existence. The warnings defect cannot exist outside of the context of someone *doing* something or *failing to do* something.

To understand North Dakota's products law regarding warnings, a number of cases must be read. Before we discuss the practical points in the trial of cases involving instructions and warnings, it is best to shortly describe the holdings in the basic cases.

In *Anderson v. Teamsters Local 116 Building Club, Inc.*,[48] the court discussed the seller's duty to give an appropriate warning.[49] The court noted that a product may be defective ("unreasonably dangerous") because the seller fails to give an appropriate warning, even though the product is well designed and manufactured, and, except for the warnings, is the best product man can manufacture.[50] The *Anderson* court explained that the duty to provide an appropriate warning may be subdivided into a duty to provide appropriate instructions for safe use, both intended and reasonably anticipated, and a duty to warn against dangers inherent with misuse, both known and reasonably anticipated.[51]

In *Mauch v. Manufacturers Sales & Service, Inc.*,[52] the court held that when defendant's negligence is the theory of recovery, then defendant may defend on the basis of plaintiff's negligence in disregarding warnings.[53] The court explained that plaintiff's conduct in regard to warnings (on the issue of defendant's negligence) should be "scrutinized in ordinary contributory negligence terminology."[54] But under the strict liability doctrine, which places emphasis on the product, the degree of care by the manufacturer is irrelevant. Therefore, the manufacturer is not allowed to defend against strict liability for lack of warnings upon the ground that the manufacturer was free of negligence.[55] In like manner, plaintiff's conduct should not be "scrutinized in ordinary

47. Note that warnings involve the merging of an actor's *conduct* with the product's existence. The warnings defect cannot exist outside of the context of someone *doing* something or *failing to do* something. *See supra* note 17 and accompanying text.

48. 347 N.W.2d 309 (N.D. 1984).

49. Anderson v. Teamsters Local 116 Bldg. Club, Inc., 347 N.W.2d 309, 311 (N.D. 1984).

50. *Id.*

51. *Id.* The North Dakota Supreme Court also noted that the duties to give appropriate instructions and warnings can be duties that arise out of the duty of due care as well as arising out of the obligation of strict liability for defective products. *Id.*

52. 345 N.W.2d 338 (N.D. 1984).

53. Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338, 347 (N.D. 1984).

54. *Id.*

55. *Id.*

contributory negligence terminology" in a strict liability warnings claim.[56] [The reader is here cautioned that this part of the case has been legislatively overruled by North Dakota Century Code section 32-03.2-01 (1987).]

The *Mauch* court also noted that only unforeseeable misuse of the product can be assessed by the jury as a cause for which the plaintiff's recovery will be reduced (not barred) proportionately.[57] In addition, the court determined that assumption of risk can only exist if the plaintiff actually knew of the defect and danger and had a reasonable choice not to use the product.[58]

In *Olson v. A. W. Chesterton Co.*,[59] the North Dakota Supreme Court heard a case involving misuse of a product.[60] The court held that misuse of a product, obviousness of the danger, and assumption of the risks are defenses to strict liability claims.[61] Further, the court noted that strict liability for a defective product can occur for lack of adequate warnings for operation of a properly designed and manufactured product.[62]

In *Butz v. Werner*[63] the court concluded that when no warning is given, the plaintiff is entitled to the benefit of a presumption that an adequate warning if given would have been read and heeded.[64] It is the corollary to the idea that when a warning is given, the defendant is entitled to the presumption that his adequate warning will be read and heeded.

In *Jacobs v. Anderson Building Co.*,[65] the court refused to allow such presumptions (that warnings would have been read if given) to be the subject of judicial instructions in a negligence action.[66] Thus, in a products liability case the presumption is given, but in a negligence case the presumption is not given.

The North Dakota Supreme Court examined a case involving warning against misuse in *Seibel v. Symons Corp.*.[67] *Seibel* held that a warning of danger against foreseeable misuse of a product

56. *Id.*
57. 345 N.W.2d at 348. Astute counsel may argue that the words used in the 1987 statutory definition of fault in N.D. CENT. CODE § 32-03.2-01 are a legislative overruling of this part of the case.
58. *Id.* Only if the plaintiff understood the danger can the jury assess the plaintiff's fault to reduce (not bar) the plaintiff's damages proportionately. *Id.*
59. 256 N.W.2d 530 (N.D. 1977).
60. Olson v. A. W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977).
61. *Id.* at 534-38.
62. *Id.* at 535.
63. 438 N.W.2d 509 (N.D. 1989).
64. Butz v. Werner, 438 N.W.2d 509, 517 (N.D. 1989).
65. 459 N.W.2d 384 (N.D. 1990).
66. Jacobs v. Anderson Bldg. Co., 459 N.W.2d 384, 387 (N.D. 1990).
67. 221 N.W.2d 50 (N.D. 1974).

must not only be given, but also must be adequate and reasonably adapted to be communicated to persons in the zone of danger.[68] A warning to an employer of the user does not necessarily insulate the manufacturer from liability: the means of communicating the warning must be such as to be reasonably expected to reach, and to be understood by the employee or other user.[69]

Layman v. Braunschweigische Maschinenbauanstalt, Inc.[70] also involved a warning which was given by the defendant to the employer but which did not reach the employee who needed the warning.[71] The court again held that the mere giving of a warning does not necessarily insulate the defendant from negligence liability for breach of the duty to give adequate instructions or warnings.[72]

Finally, in this category of important warnings, we come to the cases where proper warnings have been given and received, but have been forgotten. *Keller v. Vermeer Manufacturing Co.*[73] held that an instruction on "momentary forgetfulness" of a danger, or a warning of the danger, by the plaintiff is applicable in cases of product liability based on negligence of a defendant manufacturer to warn.[74]

In *Barsness v. General Diesel & Equipment Co., Inc.*,[75] the North Dakota Supreme Court looked at a retailer's responsibility to warn.[76] The retailers of a product, in addition to the manufacturer of the product, have a liability for negligent failure to warn of dangerous conditions of the product.[77] The adequacy of a warning should ordinarily be decided by a jury, not by the judge on a motion for elimination of that issue.[78]

Now let us look at the problems the above summarized cases

68. Seibel v. Symons Corp., 221 N.W.2d 50, 55 (N.D. 1974).

69. *Id.* at 52.

70. 343 N.W.2d 334 (N.D. 1983).

71. Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 337-38 (N.D. 1983).

72. *Id.* at 342-43.

73. 360 N.W.2d 502 (N.D. 1984).

74. Keller v. Vermeer Mfg. Co., 360 N.W.2d 502, 507 (N.D. 1984). Testimony by the plaintiff of his own forgetfulness, or of an absence of thought, warrants an instruction that momentary forgetfulness may be reasonable and not negligent. *Id.* at 506. The court explained that a reasonable man does not possess a perfect memory, is not perfectly attentive, and is not infallible. *Id.* at 507. Thus, in appropriate cases, a judge can tell the jury it is not negligence in itself for the plaintiff to momentarily forget something that was known by him.

75. 383 N.W.2d 840 (N.D. 1986).

76. Barsness v. General Diesel & Equipment Co., 383 N.W.2d 840 (N.D. 1986).

77. *Id.* at 845. Barsness brought the action for negligent entrustment and negligent failure to warn. *Id.* at 841.

78. *Id.* at 846.

create regarding trial of products cases involving product instructions or warnings. The requirement that the product defect must create an "unreasonable danger" is an integral part of North Dakota products liability law.[79] Because of this requirement, the type, or extent, of warnings going with the product involves the balancing of interests normally associated with the community's determinations of negligence. For example, a well designed and constructed knife can cut fingers. Ordinarily a reasonable man does not think of a well designed and constructed knife as defective (unreasonably dangerous) because it is not accompanied by a warning that a knife cuts. Likewise, a well designed and constructed oil well equipment component ordered by a large oil company's well-staffed engineering department is not defective because it is not accompanied by a university professor who will re-teach the oil company's excellent engineers the engineering courses on the use of the equipment. The danger that exists in these products is not "unreasonable" under the circumstances of the sale. Hence, no strict liability exists for knives and oil well equipment because they do not have detailed instructions on their use. Therefore, the balancing of interests as to what is reasonable under the circumstances is what determines the adequacy of the warnings. The consumer in these cases is supposed to know certain dangers, and it is not unreasonable for the manufacturer to omit instructions about those dangers.[80]

Because strict liability in products liability cases requires the presence of "unreasonable" danger, a jury must use the same thought process both (1) in determining negligence for failure to warn, and also, (2) in determining a product defect for failure to warn. The North Dakota Supreme Court has missed that point in requiring a complicated set of alternative theories to be given to the jury.[81]

It is in the failure to warn cases that the North Dakota Supreme Court has been at its worst, ignoring how trials actually work and what the jury is to be told. This has created a need: it is in failure to warn cases that the plaintiff and defendant need the best advocate to persuade the jury. Complicated jury instructions need the clarity of effective advocacy.

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79. Wilson v. General Motors Corp., 311 N.W.2d 10 (N.D. 1981).

80. *See generally* Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (discussing standards of expected behavior and knowledge).

81. For example, in Minnesota, failure to warn is submitted as a separate jury instruction under either negligence or product defect instructions, but not both.

Other courts have recognized that the law must be in a format and statement that allows the law to be followed by the *lay* people that make up a jury.[82] These courts have recognized that a proper jury decision is impossible when the instructions to the jury are past comprehension of the ordinary juror.

Appellate judges should be forced to periodically listen to trial judges reading an entire set of jury instruction. The average person (even an average judge) talks at only a rate of 70 words per minute.[83] That is about four minutes to read a typed page. That is about one hour to listen to the usual 20 plus pages of the trial court's instructions to the jury. Even philosophers cannot grasp that much material thrown at them in a once-heard speech. If there is some semantic difference in the jury instruction for negligent failure to warn as compared to the jury instruction for strict liability failure to warn, the difference will be ignored by the jury. Justice Levine's dissent in *Butz v. Werner*[84] rates four stars for its discussion of the need to simplify jury instructions in products warnings cases.

Due to the court's present insistence that the jury be given instructions on both liability theories for failure to warn, plaintiffs now secure a favorable emphasis in the jury instruction. The amount of time spent by the judge in instructing on the failure to warn becomes an oral, and an actual, pressure on the mind of the juror. The juror strives to find what the court has emphasized: a failure to warn against a foreseeable risk.

Before 1989, almost any product case went to the jury to determine the community standard of failure to warn. This was because the North Dakota Supreme Court gave up the court's duty to set limits on what a jury could decide in regard to the duty to warn. This is illustrated best by *Barsness v. General Diesel & Equipment Co.*.[85] In essence, *Barsness* stands for the proposition that any claim for failure to warn will go to the jury.

The jury was not asked whether the defendant adequately warned the user to not lift people with cranes.[86] In *Barsness* the

82. *See Mauch*, *supra* note 16. In *Mauch*, the court held that the jury must be instructed twice on the manufacturers duties to instruct and warn: once under negligence theories, and secondly, under strict products liability theory. *Id. cf.* Butz v. Werner, 438 N.W.2d 509, 516 (N.D. 1989) (stating that one instruction may be used to instruct juries on negligence and strict liability).

83. *See generally* J. DeVito, COMMUNICATION: CONCEPTS AND PROCESSES (1971).

84. Butz v. Werner, 438 N.W.2d 509, 521 (N.D. 1989) (Levine, J., dissenting).

85. 383 N.W.2d 840, 845-46 (N.D. 1986).

86. Barsness v. General Diesel & Equip. Co., Inc., 383 N.W.2d 840, 846 (N.D. 1986). The North Dakota Supreme Court set forth the questions as follows:

supplier of the crane gave a clear instruction and a specific warning.[87] The instruction and warning could not be more pointed. The law is also clear:

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.[88]

Yet the court gave up its responsibility ("we cannot conclude that reasonable men could not differ").[89] The court demanded that a jury determine whether the warning was not adequate so that the product became defective.[90] The court was telling litigants that the most pointed instruction and warning would not be ruled on as a matter of law. This is an element of unpredictability and instability which is not conducive toward justice (if one conceives of justice as an ordered system, with set boundaries). The court refused to set boundaries on what a jury could consider an "unreasonable" warning.[91] This is contrasted with the usual liability decisions the court makes whether any duty exists at all. Thus, in warning cases, skill of the advocate with the jury becomes of critical importance, even more important than the law. *Barsness* impliedly tells us that the jury can be persuaded to decide on the basis of what it "feels" is right; and the court will not intervene.[92]

The fact that the danger is open and obvious does not auto-

> General Diesel also contends that it warned of the dangers involved when lifting people with cranes, thereby discharging its duty to warn. The warning given by General Diesel was contained in the operator's manual supplied with the crane:
> '6. Many people have been injured when riding crane hooks or loads or while being lifted in manbaskets. They have no control over how they are handled and no protection from impacts or falls. Small mistakes can be fatal."
> 'Do not lift people with cranes. Use ladders, scaffolds, elevating work platforms or other equipment designed to lift people, but do not use cranes.'
> . . . .
> While the warning given in the operator's manual is obviously evidence favorable to General Diesel, we cannot conclude that reasonable men could not differ as to its adequacy under the facts presented in this case. Therefore, we cannot hold that it was adequate as a matter of law. Adequacy of the warning given should be left for determination by the jury at trial.

Id. (citations omitted).

87. *Id.*

88. Butz v. Werner, 438 N.W.2d 509, 517 (N.D. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965)).

89. 383 N.W.2d at 846.

90. *Id.*

91. The court's desire to submit all warnings cases to the jury is also apparent in *Butz*, where the court stated that the existence of a duty to warn is a jury question when it depends upon factual determinations. *Butz*, 438 N.W.2d at 511.

92. *Barsness*, 383 N.W.2d 840 (N.D. 1986).

matically mean the manufacturer does not need to warn of the danger.[93] The best that a defendant should hope for is a jury instruction that an open and obvious danger "is merely one factor to be considered" in determining whether a warning is needed. Let us go back to our example of the knife. The fact that a sharp knife cuts, and everyone knows that, does *not*, in North Dakota, mean a court is to determine the existence of a duty to warn of that hazard. That open danger "is merely one factor to be considered" by the jury in determining whether the product is defective for lack of warning. That is the teaching of the North Dakota cases before 1989.[94]

In 1989, the North Dakota Supreme Court for the first time exercised the court's right to determine as a matter of law whether the defendant had properly warned. In *Morrison v. Grand Forks Housing Authority*,[95] the court found no duty to warn that a battery-operated device does not work without the battery. The court determined as a matter of law that the defendant had given proper warning.[96] In *Morrison*, the court paid lip service to its previous holdings that strict liability has nothing to do with the reasonableness of conduct, and that the jury is entitled to determine whether the product is "defective."[97] The North Dakota Supreme Court then (almost incredibly when contrasted with *Barsness*) found the product not defective.[98] *Morrison* simply cannot be reconciled with *Barsness*.[99] Hence, *Morrison* does represent a practical limit to the court's tolerance to its own previous open-handed language in warnings cases. Trial courts can use *Morrison* to control some cases that would otherwise go to the jury under the *Barsness* doctrine.

Once past the forest of instructions on warnings, the jury must plunge into the thicket the court has created concerning the plaintiff's forgetfulness. For example, the effect of North Dakota cases such as *Keller v. Vermeer Manufacturing Co.*,[100] is to tell the jury that if the plaintiff testified that he forgot the warnings the manu-

93. *Butz*, 438 N.W.2d at 512, n.2.
94. *Id.* at 517.
95. 436 N.W.2d 221 (N.D. 1989).
96. Morrison v. Grand Forks Housing Authority, 436 N.W.2d 221, 228 (N.D. 1989).
97. *Id.* at 227-28.
98. *Id.* at 228. The court stated that "[e]ven though the instructions do not explicitly state that the detector will not work without a battery, the implication appears obvious." *Id.*
99. Barsness v. General Diesel & Equip. Co., Inc., 383 N.W.2d 840 (N.D. 1986) (holding that a clear statement not to lift people is not necessarily a sufficient warning).
100. 360 N.W.2d 502 (N.D. 1984) (defining the basic "forgetfulness" doctrine in North Dakota).

facturer gave the plaintiff, the jury may judge plaintiff negligent but doesn't have to, for reasonable men can forget.[101] Or, if the jury found the product warning defective,[102] plaintiff cannot be found negligent because he/she forgot the defective instruction or warning.[103]

The jury is also instructed that if this incident occurred before 1987, and if the product is found defective, the plaintiff can be found negligent for his forgetfulness, but only if plaintiff's negligence is an intervening cause of his own injury.[104] Finally, the jury is told that if the product was found to be defective, plaintiff cannot be found to have voluntarily assumed the risk of operating the product contrary to instructions, if his forgetfulness was not negligent, but if plaintiff's forgetfulness was negligent, then the plaintiff can be found to have assumed the risk.[105] Thus, a skillful advocate is required to clear a path for the jury through the thicket of forgetfulness instructions.

Seibel v. Symons Corp.,[106] and *Barsness v. General Diesel & Equip. Co.*,[107] are troublesome to handle in actual trials because they do not discuss limitations other courts have placed on jury instructions regarding warnings.[108] The North Dakota Supreme

101. Keller v. Vermeer Mfg. Co., 360 N.W.2d 502, 507 (N.D. 1984). In Erickson v. Schwan, 453 N.W.2d 765 (N.D. 1990), the North Dakota Supreme Court expanded on the doctrine of momentary forgetfulness. *Id.* at 767. The trial court had determined there was evidence from which the jury could infer that the deceased had knowledge of the danger, but that there was insufficient evidence to allow an inference that he "momentarily forgot" the danger. *Id.* The court affirmed, holding that unless the victim survives for a period of time to give his version of the mishap, there will be no direct evidence of the victim's state of mind as to whether he "momentarily forgot" at the time of the accident. *Id.* at 769. The court held that just placing yourself in a position of danger is not enough to allow the jury to speculate that there is "momentary forgetfulness" which will allow the instruction. *Id.*

102. Butz v. Werner, 438 N.W.2d 509, 517 (N.D. 1989). The parties can get a jury instruction that the seller may assume it will be read and heeded. *Id.*

103. *Keller*, 360 N.W.2d at 504. A defective warning will be ignored by the consumer. *Id.*

104. Mauch v. Manufacturers Sales and Service, Inc., 345 N.W.2d 338 (N.D. 1984).

105. *Keller*, 360 N.W.2d at 505.

106. 221 N.W.2d 50 (N.D. 1974). For a discussion of *Seibel*, see *supra* note 68 and accompanying text.

107. 383 N.W.2d 840 (N.D. 1986). For a discussion of *Barsness*, see *supra* notes 76-79 and accompanying text.

108. Other courts have pointed out that there is no duty to give instructions regarding that body of information possessed by the occupational group that normally uses the product. *See, e.g.*, Strong v. E.I. DuPont de Nemours Co., Inc., 667 F.2d 682 (8th Cir. 1981); Marshall v. H.K. Ferguson Co., 623 F.2d 882 (4th Cir. 1980); Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co., 532 F.2d 501 (5th Cir. 1976); Collins v. Ridge Tool Co., 520 F.2d 591 (7th Cir. 1975); Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967); Mays v. Ciba-Geigy Corp., 233 Kan. 38, 661 P.2d 348 (1983); Stevens v. Allis Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940).

Moreover, many courts hold that where the conditions of use are prescribed by an informed intermediary, there is no duty to warn or convey that body of knowledge normally possessed by the occupational group of which the informed intermediary was a member. *See, e.g.*, Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981);

Court seems to want a surplus of warnings. Unlike the position of the 8th Circuit,[109] the North Dakota Court has instead emphasized that the plaintiff must *knowingly* assume the risk of open and obvious hazards, and the plaintiff's negligence in ignoring what the usual reasonable man knows is no defense to strict liability.[110] This position encourages manufacturers to warn about everything under the sun. On the other hand, an abundance of warnings may become a problem. Communications experts point out that the likelihood of a warning being read is reduced when the number of warnings is increased. This is "sensory overload."[111] The court seems to ignore that sensory overload may occur.

Section 402A of the Restatement (Second) of Torts imposes liability for a product that is "unreasonably dangerous."[112] But what is the liability of the innocently ignorant seller? Assume the seller does not know, and cannot know, of the defect. Is the seller strictly liable for failure to warn of the hazard?

A majority of courts have relied upon comment j of section 402A of the Restatement, in concluding that a product is not defective unless the manufacturer knew or should have known of the product's danger at the time of distribution.[113] For example, in a Maine case, *Bernier v. Raymark Industries, Inc.*,[114] the court specifically held that when a plaintiff in a product defect case alleges a failure to warn, the defendants may introduce evidence to show that they neither knew nor reasonably could have known of the dangerous characteristics of the product.[115] North Dakota has not yet specifically ruled on this point. Thus, a North Dakota litigator may present either position to support his/her client.

Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87 (2d Cir. 1980); Haste v. American Home Products Corp., 577 F.2d 1122 (10th Cir. 1978); Helen Curtis Industries v. Pruitt, 385 F.2d 841 (5th Cir. 1967); Marker v. Universal Oil Products Co., 250 F.2d 603 (10th Cir. 1957); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984); Stevens v. Cessna Aircraft Co., 115 Cal.App.3d 431, 170 Cal. Rptr. 925 (1981); Younger v. Dow Corning Corp., 202 Kan. 674, 451 P.2d 177 (1969).

109. *See, e.g.*, Hanes v. Powermatic Houdialle, Inc., 661 F.2d 94 (8th Cir. 1981) (there is no need to warn of hazards that are open and obvious).

110. Butz v. Werner, 438 N.W.2d 509, 512, n.2 (N.D. 1989).

111. For discussion of the "sensory overload" caused by too many warnings, see Scott v. Black and Decker, Inc., 717 F.2d 251 (5th Cir. 1983); Dunn v. Lederele Laboratories, 21 Mich. App. 73, 328 N.W.2d 576 (1982); Twerski, *The Use and Abuse of Warnings in Products Liability*, 61 CORNELL L. REV. 495 (1976).

112. RESTATEMENT (SECOND) OF TORTS § 402A (1964). *See supra* note 13 for North Dakota's definition of "unreasonably dangerous."

113. *See, e.g.*, Karjala v. Johns-Manville Sales Corp.; *see generally* W. PROSSER & W. KEETON, THE LAW OF TORTS 697 (5th ed. 1984); Keeton, *The Meaning of Defect in Products Liability Law — A Review of Basic Principles*, 45 MO. L. REV. 579, 586-87 (1980).

114. 516 A.2d 534 (Me. 1986).

115. Bernier v. Raymark Industries, Inc., 516 A.2d 534, 539 (Me. 1986).

IV. DEFENSES TO PRODUCT DEFECT CLAIMS

In early products liability cases in North Dakota, the plaintiff's fault was considered to reduce or bar the plaintiff's claim. An illustrative case for that period is *Olson v. A. W. Chesterson Co.*.[116] *Olson* stated that "misuse of a product, obviousness of the danger, and assumption of risk are items that the finder of fact can take into consideration in awarding or denying damages."[117]

In 1984, the North Dakota Supreme Court eliminated negligence of the plaintiff as a defense in product defect cases. The manufacturer's defenses were sharply limited by *Mauch v. Manufacturers Sales and Service*,[118] which held that in a products liability case, the degree of care exercised by plaintiff or by the manufacturer is irrelevant.[119] Thus, plaintiff's conduct should not be examined in ordinary contributory negligence terminology in a strict liability claim, and plaintiff's negligence is not a defense.[120] The court went on to say that the seller's only defenses are the defenses of knowing assumption of risk and unforeseeable misuse.[121]

Mauch was decided at the same time as *Day v. General Motors Corporation*.[122] *Day*'s opinion creates problems when read with *Mauch*. *Day* held that the list of defenses set out by the South Dakota Supreme Court in *Smith v. Smith*[123] is a partial list of the defenses that may be available in a products liability action.[124] *Day* said there should be a case by case "equitable" determination of what defenses are available in each case.[125]

Mauch said that defenses are limited to assumption of risk and unforeseeable misuse. This cannot be reconciled with the *Day* court's statement that a court can equitably allow additional defenses.[126] Certainly, "equitable" case-by-case decisions of the "legal" defenses available in tort cases introduce the length of the chancellor's foot as the rule for decision. *Day* suggested that "the

116. 256 N.W.2d 530 (N.D. 1977).

117. Olson v. A. W. Chesterson Co., 256 N.W.2d 530, 534-37 (N.D. 1977). In addition to the suggestion that the jury could consider the foolishness of the claimant, *Olson* did not limit defenses to those listed. *Id.*

118. 345 N.W.2d 338 (N.D. 1984). See *supra* notes 53-57 and accompanying text for discussion of *Mauch*.

119. Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338, 346 (N.D. 1984) (*citing* FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16(4)(f), at 3B-156 (1983)).

120. *Id.* at 347.

121. *Id.*

122. 345 N.W.2d 349 (N.D. 1984).

123. 278 N.W.2d 155, 162 (S.D. 1979).

124. Day v. General Motors Corp., 345 N.W.2d 349, 358 (N.D. 1984).

125. *Id.*

126. *Id.*

fairness" of allowing additional defenses must be argued in each products case tried.[127] As a matter of practice after *Day*, the trial courts were not inclined to listen to such "equitable" arguments and usually limited the defenses to those set out in *Mauch*. The problem of which defenses were available was settled by the 1987 legislature's listing of defenses.[128]

In products defects cases based on negligence, before 1987, defendants looked to the North Dakota comparative negligence statute, which provided that negligence of a plaintiff does not bar his recovery absolutely "if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of negligence attributable to the person recovering."[129]

Generally, state and federal trial courts have ruled that where there are several defendants, any individual defendant whose negligence is less than that of the plaintiff's negligence will not have to pay any damages at all.[130] However, the North Dakota Federal District Court case of *Beaudoin v. Texaco, Inc.*,[131] introduced a new element into the assessment of North Dakota lawsuits. In *Beaudoin*, the federal trial court decided that the comparative negligence statute meant that the negligence of all defendants is compared as a unit to that of the individual plaintiff.[132] The jury in *Beaudoin* found negligence to be 60% to plaintiff's employer (who was not sued); 30% to plaintiff Beaudoin; and only 10% to defendant Texaco.[133] Texaco argued that it should not have to pay anything because the jury found that its negligence was less than that of the plaintiff.[134] The federal court disagreed. The court reasoned that all the responsible parties' negligence was greater than the plaintiff's.[135] Thus, the court awarded a judgment against Texaco for the full amount of plaintiff's damages, reduced only by the 30% attributable to the plaintiff.[136]

As a result, *Mauch*, *Day*, and North Dakota Century Code section 9-10-07 set out the general defenses available to the manufac-

127. *Id.*
128. N.D. CENT. CODE § 32-03.2-01 (Supp. 1989).
129. N.D. CENT. CODE § 9-10-07 (1987).
130. *See, e.g.*, Krise v. Gillund, 184 N.W.2d 405 (N.D. 1971).
131. 653 F. Supp. 512 (D.N.D. 1987).
132. Beaudoin v. Texaco, Inc., 653 F.Supp. 512, 517-18 (D.N.D. 1987).
133. *Id.* at 513. Plaintiff's employer could not be sued because of the bar of the North Dakota Worker's Compensation statute. *Id.*
134. *Id.*
135. *Id.* at 517-18.
136. *Id.* at 518.

turer in product defect cases arising before July 1, 1987, and *Beaudoin* explained one possible way to interpret the statute.

However, legislation passed by the North Dakota State Legislature in 1987 solved many problems for the trial of accidents occurring after July 1, 1987. The defenses in products cases were clearly spelled out.[137] In particular, North Dakota Century Code sections 32-03.2-01, which defined "fault," and 32-03.2-03, which specified the use of fault as a defense, are important.

North Dakota Century Code section 32-03.2-03 provided that contributory "fault" does not bar recovery in an action for product defect, but any damages are "diminished in proportion to the amount of contributing fault attributable to the person recovering."[138] The statute then went on to broadly define "fault" to include failure to exercise reasonable care to avoid the injury or mitigate the damages.[139] "Fault" included any acts or omissions that are negligent toward the person or property of the actor or others.[140] The statute specifically included "negligence" as a defense to a claim of product defect based on strict liability.[141] Assumption of risk, which the courts had thrown out, was placed back in as a defense to a claim of product defect based on negligence.[142] Moreover, the 1987 statute defined the "fault" defense to include "misuse of a product for which the defendant otherwise would be liable" as a defense whenever the misuse was "negligent" in regard to "the actor or others."[143] Thus, negligent misuse of a product, even if foreseeable, is now a defense to a product defect claim.

In short, the statute provided a broad range of defenses available to the products manufacturer for accidents occurring after July 1, 1987. The 1987 statute legislatively overrules the *Mauch* limitation of defenses.

The 1987 statute continued the system of comparative fault in its pure form as adopted by the North Dakota Supreme Court in *Day*.[144] A system of pure comparative fault is given to allow a plaintiff recovery in a products defect case *no matter whether the theory of the defect is one "involving negligence or strict liability*

137. N.D. CENT. CODE § 32-03.2 (1987). In this legislation, the legislature adopted the combined fault doctrine of *Beaudoin* for cases other than products cases. *Id.*
138. N.D. CENT. CODE § 32-03.2-03 (1987).
139. N.D. CENT. CODE § 32-03.2-01 (1987).
140. *Id.*
141. *Id.*
142. *Id.*
143. N.D. CENT. CODE § 32-03.2-01 (1987).
144. Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984).

or breach of warranty."[145]

If the product has been modified in any way, attorneys should be alert to the cases of *Johnson v. John Deere Company*,[146] and *Witthauer v. Burkhart Roetgen, Inc.*[147]

In *Johnson* the jury found the plaintiff 1/3 at fault for the accident, and the defendant 2/3 at fault. However, in spite of the comparative negligence statute in North Dakota, the defendant totally escaped liability.

In granting judgment for the defendant, Federal District Judge Conmy had to balance two conflicting North Dakota statutes. The first statute was the 1979 Product Liability Act.[148] Among other things, it provides that a manufacturer of a product should not be held liable for any injury sustained as a result of a product defect if "a substantial contributing cause of the injury . . . was an alteration or modification of the product. . . ."[149] The second statute was the 1987 pure comparative fault statute for product liability actions.[150] The statute provides for a recovery by the plaintiff to the extent that the defendant has any fault at all in the product liability action.

In the *Johnson* case, Judge Conmy submitted a special interrogatory to the jury whether there had been an alteration of the product and whether the alteration was a "substantial contributing cause of the plaintiff's injuries."[151] When the jury answered both of the questions in the affirmative, Judge Conmy held that the alteration completely barred the plaintiff from any recovery under strict liability, negligence or warranty theories.[152] Judge Conmy's reasoning was that the earlier 1979 statute was intended as an absolute bar in the special case of product modifications, and it was not defeated by the later statute allowing a percentage of recovery in products cases based on comparative fault.

Judge Conmy's logic was not followed by the North Dakota

145. N.D. CENT. CODE § 32-03.2-02 (1987) (emphasis added). Section 32-03.2-02 has a system of modified comparative fault barring recovery if the plaintiff's negligence is greater than the combined fault of the other parties contributing to the injury. *Id.* This section also cross-references and excludes any claim of fault for "product defect." *Id.*

146. No. 84-87-217, slip op. (D.N.D. 1990). This case has since been affirmed by the Eighth Circuit Court of Appeals. Johnson v. John Deere Co., No. 90-5379 (8th Cir. 1991) (1991 U.S. App. Lexis 5346).

147. 467 N.W.2d 439 (N.D. 1991).

148. N.D. CENT. CODE § 28-01.1 (Supp. 1989).

149. N.D. CENT. CODE § 28-01.1-04 (Supp. 1989).

150. N.D. CENT. CODE § 32-03.2-03 (Supp. 1989).

151. Johnson v. John Deere Co., No. 84-87-217, slip op. at 8 (1991).

152. *Id.* at 9.

Supreme Court in *Witthauer*.[153] In *Witthauer*, a medical lamp had been bumped, and as a result, the heat protection shield had fallen off.[154] It was foreseeable that this could happen. The defendants claimed that the medical clinic's use of the lamp was the use of the lamp with an alteration (no heat shield), and that section 28-01.1-04 of the North Dakota Century Code protected them.[155] The court concluded that the legislature could not have intended a result so contrary to prevailing products liability doctrine, and held that section 28-01.1-04 does not prevent a manufacturer from being liable when the liability is premised on the negligent failure to provide adequate warnings of danger resulting from a foreseeable alteration of the product.[156]

Although the *Witthauer* case involved failure to provide warning against a foreseeable alteration, it is easy to argue that *Witthauer* stands for the proposition that even on design claims, the manufacturer is liable if the alteration is foreseeable. In short, *Witthauer* is the way around section 28-01.1-04. To claim the bar of section 28-01.1-04 and the reasoning of Judge Conmy in the *Johnson* case, the defense will have to argue that the alteration was not foreseeable.

V. ECONOMIC DAMAGES

In *Hagert v. Hatton Commodities, Inc.*,[157] the court held that economic loss, as distinguished from injury to person or property, cannot be recovered under the doctrine of strict liability, but only may be recovered under theories of breach of warranties.[158] Initially, *Hagert* created problems by not defining "economic loss."[159] It obviously is not meant to be the same as "economic loss" as used in North Dakota Century Code section 32-03.2-04.[160] The physical damage created when a defective electric cord damages a computer is not economic loss, so plaintiff probably can recover the physical loss. But what of the business the plaintiff could not do that day because the computer was down? Is it an economic loss? What if the defective electric cord also injured an employee and

153. Witthauer v. Burkhart Roentgen, 467 N.W.2d 439 (N.D. 1991).
154. *Id.* at 440.
155. *Id.* at 444. Section 28-01.1-04 provides that a manufacturer or seller will not be held liable for an injury "where a substantial contributing cause of the injury . . . was an alteration or modification of the product. . . ." N.D. CENT. CODE § 28-01.1-04 (Supp. 1989).
156. *Witthauer*, 467 N.W.2d at 445.
157. 350 N.W.2d 591 (N.D. 1984).
158. Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 595 (N.D. 1984).
159. *Id.* at 594.
160. N.D. CENT. CODE § 32-03.2-04 (1987).

the plaintiff employer must pay the hospital bills? Are those bills the forbidden-to-collect economic loss? Those questions are yet to be litigated in North Dakota.

Guidance may be obtained from the cases in Minnesota, which have discussed the economic loss limitations in detail. The Minnesota Supreme Court has described economic loss as follows:

> Generally, "economic loss" has been defined as resulting from the failure of the product to perform to the level expected by the buyer and commonly has been measured by the cost of repairing or replacing the product and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold.[161]

Hagert sweepingly provided that any economic loss cannot be recovered under the doctrine of strict liability.[162] Other courts have distinguished between consumer transactions and commercial transactions. For example, the *Superwood*[163] doctrine in Minnesota holds that only economic losses that arise out of commercial transactions are not recoverable under tort theories or strict products liability theories.[164] Under *Superwood*, economic losses arising out of consumer product transactions are recoverable in Minnesota.[165]

Hagert limited economic loss recovery to warranty theory.[166] However, North Dakota case law holds that whenever a strict liability exists, implied warranty also exists, and vice versa.[167] Apparently, a plaintiff can recover for economic loss if he/she names his/her theory correctly on the same set of facts. But why have two different theories of recovery for the same set of facts? North Dakota case law creating an implied warranty of no defect has not been overruled.[168] This could be significant in future litigation

161. Minneapolis Soc. of Fine Arts v. Parker-Klein Associates Architects, Inc., 354 N.W.2d 816, 820-21. For additional guidance on the term "economic loss," the discussion in Agristor Leasing v. Spindler, 656 F.Supp. 653 (D.S.D. 1987) and the definition in Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 449 (Ill. 1982) are helpful.

162. Hagert v. Hatten Commodities, Inc., 350 N.W.2d 591, 595 (N.D. 1984).

163. Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 160 (Minn. 1981) (dealt with the failure of a hot plate press).

164. *Id.* at 162.

165. *Id.* at 163.

166. 350 N.W.2d 591, 595 (N.D. 1984).

167. *See* Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D. 1976) (holding a product defective under warranty theory is defective under strict liability theory, and vice versa); and Lang v. General Motors Corp., 136 N.W.2d 805, 810 (N.D. 1965) (when a product is sold by a merchant "into the stream of trade" there is a judge-made implied warranty of no defect that runs with the product to the ultimate consumer).

168. *Lang*, 136 N.W.2d at 809.

regarding recovery for "economic" loss. The judge-made implied warranty of no defect can give equal recovery to that which might be recovered on a strict liability theory.[169] The sole practical result of *Hagert*'s limitation of economic recovery to warranty theory might be to confuse juries, lawyers, and trial judges struggling to write sensible jury instructions!

Is it a "wrong" to have a defective product? Of course it is, under today's understanding of strict liability for defective products. Is it a tort? Of course it is. *Hagert*'s limitation of damages for a tort is in opposition to the North Dakota statutes which hold that when a wrong exists, there shall be compensation for "all the detriment" proximately caused.[170] The North Dakota Supreme Court can create a new tort of strict liability. Can it limit the damages for the tort? Section 32-03-20 of the North Dakota Century Code mandates recovery of damages for "all the detriment."[171] Historically, the North Dakota Legislature has tended to eliminate judge-made restrictions on the general theory of damages for tort. Thus, the "economic loss" restriction of *Hagert* may become a battleground in future cases.

Hagert held that (even without a contract limitation of liability clause) economic loss cannot be recovered under a strict liability theory.[172] The *Hagert* court cited the California case of *Seely v. White Motor Co.*,[173] in which the California court approved a distinction based on the type of harm caused by the defective product.[174] The *Seely* court suggested that the commercial situation was different from the situation involving the ordinary consumer.[175] The North Dakota Supreme Court should continue its use of *Seely* and adopt this approach of distinguishing between commercial transactions and the situation of a non-commercial consumer.[176]

Moreover, when both physical damage to the product itself and physical damage to other items has occurred, most courts have

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169. *See* Vigeant v. Zimmer, Inc., 612 F. Supp. 1043 (D. Mass. 1985). *Vigeant* noted that Massachusetts does not recognize a separate doctrine of strict products liability, but has adopted warranty law to be "a remedy intended to be fully as comprehensive as the strict liability theory of recovery that has been adopted by a great many other jurisdictions." *Id.* at 1045 (quoting Back v. Wickes, 375 Mass. 633, 639, 378 N.E.2d 964, 968 (1978)). This was apparently the road North Dakota was traveling in *Lang*, and *Lang* has not been overruled.

170. N.D. CENT. CODE §§ 32-03-20 (1976).

171. *Id.*

172. Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 595 (N.D. 1984).

173. 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

174. Seely v. White Motor Co., 45 Cal. Rptr. 17, __, 403 P.2d 145, 151-52 (1965).

175. *Id.* at 151.

176. Traditionally, consumers have been seen as needing increased protection.

held that the economic loss flowing from the damage to the product itself can be recovered, despite other limitations imposed by the court on recovery of economic loss for strict liability.[177] Further, when courts have faced a situation where the only remedy for the economic loss is the tort remedy, they have found exceptions to their own rules prohibiting recovery of economic loss on tort theories.[178]

VI. MITIGATION OF DAMAGES

In *Day v. General Motors Corporation*,[179] a question was certified by the District Court relating to the products liability theory of recovery. If the plaintiff's percentage of fault is relevant, should the determination include both plaintiff's accident producing fault, and also, injury enhancing fault so as to reduce, or as the case may be, defeat plaintiff's recovery?[180]

The North Dakota Supreme Court answered the certified question in the affirmative. The Court stated that the "injury enhancement" defense should be implemented as follows:

> The trier of fact will have to determine and find which of the disputed facts will be accepted. The facts so found will judicially determine what caused the accident and what caused the injury and what, if anything, enhanced the injury . . . [S]pecial interrogatories, in addition to the jury instructions and the special verdict, may be necessary to resolve the causation factors.[181]

The North Dakota Supreme Court mandated no less than three levels of causation to be determined: "[W]hat caused the accident, and what caused the injury, and what, if anything, enhanced the injury."[182] This created a problem in constructing the jury instructions, and also in constructing the special verdict form.

Furthermore, when *Day* was read in conjunction with *Mauch*,[183] it became more confusing for injuries before the 1987 statute. In *Mauch*, the court seemed to indicate that the only

177. *Cf.* S.J. Groves & Sons, Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 434 (Minn. 1985).

178. *Cf.* Reeder v. Old Oak Town Center, 124 Ill. App. 3d 1045, __, 465 N.E.2d 113, 116-17 (1984).

179. 345 N.W.2d 349 (N.D. 1984).

180. Day v. General Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984).

181. *Id.* at 357-58.

182. *Id.* at 357.

183. Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338 (N.D. 1984).

defenses available in products liability actions were the plaintiff's unforeseeable misuse and the plaintiff's assumption of risk.[184]

Halvorson v. Voeller[185] added to the confusion by holding that the defendants may show a plaintiff's failure to wear protective devices as comparative negligence to reduce the amount of the damages.[186] In *Halvorson*, the North Dakota Supreme Court stated:

> It is the jury's function in the first instance to decide if a reasonable person exercising ordinary care would have worn a helmet to avoid or mitigate injury in the event of an accident. Only if (1) the jury answers this question in the affirmative, and (2) there is competent evidence establishing a causal connection between the plaintiff's failure to wear a helmet and the *injuries* he received, may the jury reduce damages to the extent that a helmet would have decreased the plaintiff's injuries.[187]

Halvorson seemed to give the products liability defendant an "end run" around *Mauch*'s prohibition against using plaintiff's negligence as a defense to liability. However, it was a cumbersome approach to using the plaintiff's negligence (*i.e.*, on the theory that he enhanced an injury that could have otherwise been avoided).

In 1987, the North Dakota Legislature changed the defenses the North Dakota Supreme Court had set up in products liability cases, including the cumbersome method used in mitigation of damages.[188] Section 32-03.2-03 of the North Dakota Century Code, which is effective as to accidents occurring after July 8, 1987, provides for a reduction of the plaintiff's verdict "in proportion to the amount of [contributing] fault attributable to the person recovering."[189] Section 32-03.2-01 defines "fault" to include

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184. *Id.* at 347. *Mauch* indicated that plaintiff's negligence should not be compared to a manufacturer's fault in a products liability, strict liability, theory. *Id.*

185. 336 N.W.2d 118 (N.D. 1983).

186. Halvorson v. Voeller, 336 N.W.2d 118, 121 (N.D. 1983). *Halvorson* involved a motorcycle accident. *Id.*

187. *Id.* Under present law, *Halvorson* might dictate a jury instruction essentially like this:

> If you find (1) it was unreasonable for the plaintiff to not wear a helmet, and (2) the plaintiff would not have received some or all of his injuries had he worn a helmet, then (3) the amount of damages awarded the plaintiff for the injuries he sustained must be reduced in proportion to the amount of injury he would have avoided by the use of the helmet. The burden of proof on both points (1) and (2) rests with the defendant.

Id.

188. *See* N.D. CENT. CODE § 32-03.2-03 (Supp. 1989).

189. *Id.*

not only negligence and assumption of risk, but also "failure to exercise reasonable care to avoid an injury or to mitigate damages."[190]

Although it would be technically possible for the North Dakota Supreme Court to say that the difficult step by step separate decisions previously prescribed by the court is still necessary, it seems that the legislature wanted all fault to be considered in a lump. This is much more sensible and is something the jury can more easily understand and accomplish. Thus, the jury need only answer what proportions of fault contributed to the injury; the jury does not necessarily have to go through the formal process of three separate levels of causation set out in cases like *Halvorson*.

VII. IMPLIED WARRANTIES

There are some things that the law says are so common that a warranty will be implied just by everyday custom (unless the seller specifically tells us that he isn't guaranteeing the product in those ways). The most common implied warranties are: (1) "merchantability"[191] and (2) "fitness for particular purpose," that the seller knew the buyer intended.[192]

These implied warranties are set out by statute. However, a number of rules and counter-rules exist regarding implied warranties. The rules and counter-rules generally follow the customs of merchants for the last few centuries.[193] Most of them are found in the Uniform Commercial Code adopted by all the states. In North Dakota the significant exception to the usual statutory warranty defenses is the statutory defense of comparative fault to product defect warranty claims.[194]

In *Air Heaters, Inc. v. Johnson Electric, Inc.*,[195] the court held that it is necessary to determine whether the predominant factor in the contract was (a) a sale of goods with labor incidentally

190. N.D. CENT. CODE § 32-03.2-01 (Supp. 1989).

191. *See* N.D. CENT. CODE § 41-02-31 (1983 & Supp. 1989). This means that the goods are like others of the same kind, and no defects exist in the particular goods sold that do not exist in the others of the same kind that the seller is selling. *Id.*

192. *See* N.D. CENT. CODE § 41-02-32 (1983 & Supp. 1989). This means the seller must sell a product that can be expected to do the job for which it was sold. For example, if a buyer tells the seller that he or she wanted something to unfreeze a water pipe, and the seller sells the buyer a heat tape that doesn't come close to doing the job, the seller has breached the warranty of reasonable fitness for the job the buyer intended it to perform. *See id.*

193. Most of these rules have been codified in the Uniform Commercial Code, which has been adopted by all fifty states.

194. N.D. CENT. CODE § 32-03.2-03 (1989).

195. 258 N.W.2d 649 (N.D. 1977).

involved; or (b) a service contract with goods incidentally involved.[196] This distinction is crucial to determine whether there is a statutory implied warranty. If it is predominantly (a), a sale of goods, the statutory UCC warranties apply. If it is predominantly (b), a service contract, there is no *statutory* implied warranty of fitness of purpose.[197] The court did not decide if there would be a judge-made implied warranty of fitness in all service contracts.

In service contracts for construction of buildings, a judicially created warranty of fitness for the purpose exists if: the contractor held himself out as competent to undertake the contract; the owner had no particular expertise in the kind of work contemplated; the owner furnished no plans, designs, or details; and, the owner passively or specifically indicated his reliance on the experience and skill of the contractor.[198]

Northwestern Equipment, Inc. v. Cudmore[199] involved a repair contract, the predominant factor of which was services.[200] The court specifically stated that this "services" case did not need to be decided on the ground that there is an implied warranty of fitness in a "services" contract other than those involved "with the construction process."[201]

Shirazi v. United Overseas, Inc.[202] ends this catalog of cases often used in the trial courts. *Shirazi* held that contract stipulations printed on the back of a document will not be deemed to be assented to in the absence of proof of plaintiff's knowledge thereof before the sale.[203]

The effect of the above basic product warranty cases has been to favor plaintiffs at the expense of following long established rules. The court seems bent on affirmatively finding new law and new relief for old problems. North Dakota may well be the "easiest" state in which the law will imply a warranty, implying a warranty of fitness in *any* contract for a completed job or product, in the absence of express statements, or even contrary to express denials of warranty that might be found in some of the written

196. Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649, 652-53 (N.D. 1977).
197. *Id.* at 652.
198. *Id.* at 653.
199. 312 N.W.2d 347 (N.D. 1981).
200. Northwestern Equip., Inc. v. Cudmore, 312 N.W.2d 347, 348-49 (N.D. 1981).
201. *Id.* at 351. In this case, the evidence was found insufficient to find a breach of an implied warranty of fitness for purpose even if legally an implied warranty of fitness existed. *Id.* Further, the court specifically turned to a North Dakota Law Review article discussing the extension of the sale of goods and implied a warranty of fitness to non-construction contracts. *Id.* at 351 n.3.
202. 354 N.W.2d 651 (N.D. 1984).
203. Shirazi v. United Overseas, Inc., 354 N.W.2d 651, 656 (N.D. 1984).

documents.[204]

I am not concerned whether it is socially good or bad to have implied warranties in all sales of services and products. What I am concerned about is the *appearance* of change as a constant applied by the court in any case. This is creating unnecessary uncertainty for litigants at trial. Any good lawyer, whether for defendant or plaintiff, now must advise his client that the North Dakota Supreme Court may find an implied warranty in any contract for either services or goods, and the existence of a disclaimer may depend on plaintiff's oral skills in professing ignorance of a written disclaimer.

The trial courts in North Dakota, in constructing the instructions for the jury, now must struggle to determine "whether the predominant factor in the contract" was a service contract or a sale of goods contract. In *Air Heaters*, the court stated that this determination must be made.[205] However, the court has not given guidance as to what the trial court should *do* if it finds a services contract for other than building construction.[206] If a services contract exists, then the trial court is faced with the problem of determining whether there should be a judicially created warranty of fitness on which the jury should be instructed.

What makes this distressing is that the questions regarding the existence of judicially created implied warranties are questions that interact with existing negligence and strict liability law. In other words, if there is predominantly a sale of goods, there is a basis for applying the strict liability law of products. Implying a warranty is not needed for social justice! Likewise, in services contracts, a basis for liability for fault for negligence already exists; warranty is not needed for social justice. Adding implied warranty law to jury instructions which already contain negligence and strict liability theories creates a mental bog which is unlikely to produce theoretically correct jury instructions.

What makes the situation doubly distressing is that it can be argued that it is contrary to statute to have judge-made implied warranty. North Dakota is a "code" state. That is, the early North Dakota legislature tried to enact a code of laws that would be sufficient to answer all questions of relationships and liabilities. The North Dakota Century Code contains a statute specifically declar-

204. *Cf.* Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 509, 626 (1980).

205. Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649, 652 (N.D. 1977).

206. *Id.*

ing that "there is no common law in any case where the law is declared by the code."[207] The North Dakota Century Code specifically declares there to be implied warranties in certain situations.[208] Further, the Code also specifically deals with misrepresentations or false representations.[209] It would be easy (and theoretically best) if the North Dakota Supreme Court would state that North Dakota Century Code section 1-01-06 (no common law where statutes exist) requires that the only implied warranties are the implied warranties stated in the Code (and no judge-made implied warranties can exist). Similarly, it could be said that the Code specifies what is an actionable false representation; hence, the Code is sufficient to take care of those situations in which the expectations of a plaintiff were aroused by actions of the seller of a product. Dragging judicially created implied warranties into products litigation creates unnecessary problems.

The North Dakota Supreme Court has experimented previously with judicially created implied warranties of fitness. In *Lang v. General Motors Corp.*,[210] the court implied a warranty of fitness of a product.[211] That experiment was cut short by the express adoption of strict liability theory in *Johnson v. American Motors Corp.*.[212] Although *Johnson* did not overrule *Lang*, but merely added the better remedy to plaintiffs' armory, since *Johnson* the judge-made implied warranty has not been used in the trial courts.[213]

Northwestern Equipment, Inc. v. Cudmore[214] created unnecessary problems by leaving open when and how often judge-made implied warranties will be created.[215] When an appropriate case comes to the court it could be argued that the *only* implied warranties in products cases are the statutory warranties; the only rules for deciding whether a disclaimer of implied warranty is good are the statutory rules; and there is not an implied warranty in any services contract. If no implied warranty exists in services contracts, an announcement by the court whether the statutory law on misrepresentations takes care of expectations would be in

207. N.D. CENT. CODE § 1-01-06 (1987). *See, e.g.*, Kaylor v. Iseman Mobile Homes, 369 N.W.2d 101 (N.D. 1985).
208. *See, e.g.*, N.D. CENT. CODE §§ 41-02-31, 32 (1983).
209. N.D. CENT. CODE § 41-01-03 (1983).
210. 136 N.W.2d 805 (N.D. 1965).
211. Lang v. General Motors Corp., 136 N.W.2d 805, 810 (N.D. 1965).
212. 225 N.W.2d 57 (N.D. 1974).
213. Johnson v. American Motors Corp., 225 N.W.2d 57, 65 (N.D. 1974).
214. 312 N.W.2d 347 (N.D. 1981).
215. Northwestern Equip., Inc. v. Cudmore, 312 N.W.2d 347, 354 (N.D. 1981).

order. Alternatively, if the court says an implied warranty in service contracts exists, then the court should outline the way the implied warranty can or can not be disclaimed. The court should not evade the job of creating a total plan regarding implied warranty for any contract to supply either a finished product or a service.

VIII. DISCLAIMERS OF WARRANTIES

The Uniform Commercial Code provides that the seller may disclaim warranties, but only if the disclaimer is "conspicuous."[216] In addition, the Code provides that the seller may limit the remedies afforded to the buyer in the event of a breach of warranty that was given.[217]

Although it has sometimes been argued that the disclaimer of all warranties is unconscionable, the Code specifically permits it.[218] It is only in the limitation of warranty section that it is provided that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable."[219] In other words, it is possible to totally exclude warranties and all liability flowing from warranties.[220] But if a warranty is given, warranty damages cannot be limited for personal injury from consumer goods.

In North Dakota, an exclusion of a warranty can only occur as a "part of the basis of the bargain between the parties."[221] Our North Dakota Supreme Court has said that warranty disclaimers are not effective unless explicitly negotiated between buyer and seller and set forth with particularity.[222] Disclaimers, to be effective, must be conspicuous or brought to the buyer's attention.[223]

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216. N.D. CENT. CODE § 41-02-33 (1983).
217. N.D. CENT. CODE § 41-02-98 (1983).
218. N.D. CENT. CODE § 41-02-33 (1983).
219. U.C.C. § 2-302 (codified at N.D. CENT. CODE § 41-02-19 (1983)).
220. *Cf.* Hunter v. Texas Instruments, Inc., 798 F.2d 299 (8th Cir. 1986) (holding that a remote manufacturer can disclaim warranties to an ultimate purchaser at retail where the disclaimer is in the purchase contract between the retailer and the ultimate purchaser).
221. Scientific Application, Inc. v. Delkamp, 303 N.W.2d 71, 74 (N.D. 1981) (citation omitted).
222. *Id.* at 74-75 (stating that mere notice of limitations of warranty which are not incorporated into the contract and therefore not basis of the bargain is insufficient to prevent a buyer from seeking recovery for breach of warranty).
223. *See, e.g.*, Construction Assoc. v. Fargo Water Equip. Co., 446 N.W.2d 237 (N.D. 1989). The *Construction Associates* court quoted Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403, 410 (1980) which stated:

> To be part of the bargain, a provision limiting the defendant's liability must, unless incorporated into the contract through prior course of dealings or trade usage, have been bargained for, brought to the purchaser's attention or be conspicuous. If not, the seller has no reasonable expectation that the remedy

In *Construction Associates, Inc. v. Fargo Water Equipment Co.*,[224] the North Dakota court pointed out that even if it is part of the bargain, the limitation of remedies to the exclusion of "minimum adequate remedies" is unconscionable and will not be enforced, even when it is an agreement between commercial parties.[225]

Therefore, in North Dakota, even in commercial contracts, and even when the disclaimer was considered in setting the sales price, if the limitations and exclusions "leave the non-breaching party with no effective remedy," the limitations and exclusions will be held to be unconscionable and not enforced in North Dakota.[226]

In contrast with a warranty disclaimer, some contracts contain provision against liability for negligence. Courts outside North Dakota have often said that a disclaimer of liability for negligence will generally fail, as it is against public policy, even where the loss is purely economic.[227] However, some courts have pointed out that where the parties are in equal bargaining positions and the disclaimer of liability for negligence is clear and unequivocal, the courts may recognize the disclaimer.[228]

North Dakota Century Code section 9-10-06 provides that everyone is to be responsible for their own negligence.[229] In the past, the North Dakota Supreme Court has generally not favored contracts that try to protect a party against his/her own negligence.[230] However, in 1984, a court made up of new members decided *Bridston v. Dover Corp.*.[231] In *Bridston*, the court

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> was being so restricted and the restriction cannot be said to be part of the agreement of the parties. Nor does the mere fact that both parties are businessmen justify the utilization of unfair surprise to the detriment of one of the parties since the Code specifically provides for the recovery of consequential damages and an individual should be able to rely on their existence in the absence of being informed to the contrary either directly or constructively through prior course of dealings or trade usage.

Id. at 410 (citations omitted).

224. 446 N.W.2d 237 (N.D. 1989).

225. Construction Assoc. v. Fargo Water Equip., 446 N.W.2d 237, 243 (N.D. 1989).

226. *Id.* at 244.

227. Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20, 24-25 (M.D. Ala. 1975) (it is against public policy for a manufacturer of a soybean inoculant to contract against its own negligence); Dessert Seed Co. v. Drew Farmer's Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (a limitation of negligence liability for the purchase price of seeds is against public policy where discovery as to "defective" seeds can only occur once the growing season is already over).

228. *See infra* notes 239-248 and accompanying text.

229. N.D. CENT. CODE § 9-10-06 (1989) (willful acts and negligence liability).

230. *See, e.g.*, Note, *Negligence & Secondary School Sports Injuries in North Dakota: Who Bears the Legal Liability?*, 62 N.D. L. REV. 458 (1986).

231. 352 N.W.2d 194 (N.D. 1984).

approved a contractual provision between parties of equal bargaining power in a commercial setting, which protected a party against its own negligence.[232] As a result of *Bridston*,[233] it is likely that some contractual limitations on negligence claims will be upheld by the North Dakota Supreme Court.[234]

No North Dakota case law exists which is directly on point regarding strict liability disclaimers. In *Johnson v. American Motors Corporation*,[235] the court explicitly adopted section 402A of the Restatement of Torts (Second).[236] Since that time, the court has generally followed the Restatement and its annotations. The Restatement states that the rule of strict liability cannot be affected by any disclaimer in a *consumer goods* contract of sale.[237]

Presently, no North Dakota case exists which considers whether a contractual disclaimer of liability in a *commercial sales contract* for products is effective to disclaim tort liability (predicated on negligence or strict liability) in cases where the damaged party was a business of substantial size. The authority is split in other jurisdictions on this question.

A few jurisdictions have taken the position that such disclaimers are *per se* invalid.[238] The majority of courts have taken the position that strict liability disclaimers in commercial contracts are enforceable under certain limited circumstances.[239] Several commentators argue that disclaimers for economic damages flowing from damage to the product itself in contracts between commercial contractors should be allowed no matter what other physical or personal injuries are involved.[240] The language in *Hagert* seems to favor allowing disclaimers in commercial contracts for sale of products.[241]

Viewing the cases as a whole, it appears that a strict liability or negligence disclaimer in a commercial contract stands the greatest likelihood of being enforced where all of the following circum-

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232. Bridston v. Dover Corp., 352 N.W.2d 194 (N.D. 1984).

233. *Id. See also* notes 226-235 and accompanying text.

234. *Cf.* American Crystal Sugar Co. v. Greenberg Roofing & Sheet Metal Co., 465 N.W.2d 614 (N.D. 1991).

235. 225 N.W.2d 57 (N.D. 1974).

236. Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974).

237. RESTATEMENT (SECOND) OF TORTS § 402, comment m (1964).

238. *See, e.g.*, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974) (applying Oklahoma law). (*Sterner* remains the leading case for this position).

239. *See, e.g.*, Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974).

240. Note, *Products Liability in Commercial Transactions*, 60 MINN. L. REV. 1061 (1976); Krol, *Aviation Products: Commercial Disclaimers*, INS. L.J. 615 (1979).

241. Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591 (N.D. 1984). *Cf.* S. J. Groves & Sons, Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431 (Minn. 1985).

stances are present: (1) the defective product has caused damage to other property but not personal injury; (2) the buyer and seller possessed roughly equal bargaining power; (3) the parties negotiated and bargained for the disclaimer; (4) the disclaimer is clearly applicable to the particular type of injury suffered,[242] and (5) the enforcement of the disclaimer would not offend any public policy of the forum.[243]

One of the best reasoned decisions in this area is *Salt River Project Agricultural Improvement & Power District v. Westinghouse Electric Corp.*.[244] The court's holding discussed most of the factors enumerated above:

> We hold, however, that tort remedies may be waived. Although tort law does not recognize "disclaimers" and will not give them effect, it will recognize waivers. A waiver will be given effect when it represents "an intentional relinquishment of a known right." [citations omitted] That relinquishment will be permitted where commercial parties have equal bargaining positions so that the choice was freely and fairly made and not forced by the circumstances. Further, the parties must have negotiated the specifications of the product and have knowingly bargained for the waiver. Under these circumstances our courts will enforce the bargain, even if it turns out to have been a bad bargain for one party or the other. The agreement will not be enforced, however, when it is the product of coercion or inadvertence. Tort remedies may not be waived in an unknowing exchange of forms between shipping clerk and order clerk. An actual bargain must be made by those responsible for the transaction.[245]

The language used by the court in *Hagert v. Hatton Commodities, Inc.*[246] seems to imply that in commercial contract cases North Dakota is likely to follow the *Salt River Project* line of cases.

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242. *See* Keystone Aeronautics Corp. v. R. J. Enstrom Corp., 499 F.2d 146, 150 (3d Cir. 1974) (tort limitations of liability in commercial contracts will be construed most strongly against the party relying on it).

243. *See* Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, __, 350 N.Y.S.2d 617, 623, 305 N.E.2d 750, 754 (1973) ("we see no reason why in the absence of some consideration of public policy parties cannot by contract restrict or modify what would otherwise be a liability between them grounded in tort"). *Id.*

244. 694 P.2d 198 (Ariz. 1984).

245. Salt River Project Agricultural Improvement & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 385, 694 P.2d 198, 215.

246. 350 N.W.2d 591 (N.D. 1984).

On the other hand, the language used by the North Dakota Supreme Court in *Construction Associates, Inc. v. Fargo Water Equipment Company*[247] would appear to indicate that North Dakota is likely to follow the *Sterner Aero* line of cases. The litigator and the trial judge must decide, based on his or her experience, whether North Dakota will follow the *Sterner Aero* line of cases or the *Salt River Project* line of cases of other jurisdictions.

IX. MISREPRESENTATION

A real estate sales case, decided on the grounds of the existence of fraud, points the way toward future developments in product sales law. In *Holcomb v. Zinke*[248] the purchasers were not told about defects in the home they purchased.[249] To decide the case, the court looked to the doctrine of constructive fraud.[250]

Constructive fraud occurs when a person, without any fraudulent intent, breaches a duty and thereby gains an advantage by misleading another.[251] In *Holcomb* the court agreed that the duty to disclose is usually based on a fiduciary or confidential relationship existing between the parties.[252] However, there was no such fiduciary or confidential relationship in the arms-length real estate transaction in *Holcomb*.[253] The court first noted the absence of the usual reason for courts to require disclosure and went on to say that — despite the lack of a fiduciary or confidential relationship — there is a duty to disclose material facts which should in good faith be disclosed.[254]Where there is a breach of the good faith duty to disclose, by the passive concealment of material defects, there is constructive fraud.[255]

Although *Holcomb* is a real estate case and it interprets the constructive fraud statute, its statutory language is not limited to sales or realty. Logically, the *Holcomb* doctrine could extend to contracts of sales of products. If applied to the sales of products, the *Holcomb* doctrine might mandate that when a seller passively conceals material defects of which he knows or *should* know, when the defects are not reasonably discoverable by the buyer, and when the seller has gained an advantage by the failure to dis-

247. 446 N.W.2d 237 (N.D. 1989).
248. 365 N.W.2d 507 (N.D. 1985).
249. Holcomb v. Zinke, 365 N.W.2d 507, 509 (N.D. 1985).
250. *Id.* at 510.
251. N.D. CENT. CODE § 9-03-09 (1987).
252. *Holcomb*, 365 N.W.2d at 511.
253. *Id.*
254. *Id.* at 512.
255. *Id.*

close (*i.e.*, the properly prepared plaintiff testifies that he would not have bought the product if advised of the defect), then the seller has breached a duty to disclose and has committed a constructive fraud.

The court in *Holcomb* specifically created a "should have known" negligence standard for misrepresentation.[256] The court specifically held that the seller of a house must disclose defects he "*should*" know exist.[257] Constructive fraud does not require fraudulent intent. Thus, a seller of a house in North Dakota must not be negligent in discovering defects or disclosing those defects to the buyer. It would seem that the same duty would apply to the seller of any product (particularly in a commercial setting), because *Holcomb* is based generally on the constructive fraud statute.

The *Holcomb* court reasoned that the seller had a duty to disclose because of the "clearly superior position of the seller vis-a-vis knowledge of the condition of the property being sold."[258] Some defendants, such as a retailer of a closed package, could use this lack of opportunity for knowledge as a defense to the constructive fraud doctrine in a products case. Plaintiffs, on the other hand, could argue that a constructive fraud exists in almost any defective or dangerous product where the manufacturers have engineering employees with a superior opportunity over consumers to know of engineering data that a potential problem exists. For example, some plaintiff may soon be arguing a constructive fraud exists because he or she was not told that the garage door opener he or she purchased only had a working lifetime of 10,000 cycles.

A pair of 1990 North Dakota cases, *West v. Carlson*[259] and *Dewey v. Lutz*[260] emphasize the North Dakota Supreme Court's tendency to allow fraud to be brought into contracts of sale. Although both *West* and *Dewey* involved the sale of real estate, the principles and reasoning involved in those cases could be applied to products equally well. In both of those cases, the court worked on the theory that a positive assertion, in a manner not warranted by the information of the person making it, which is not true, although the person believes it to be true, is a fraud. The court required that when a party responds to an inquiry involving the

256. *Id.*
257. *Holcomb*, 365 N.W. 2d at 512.
258. *Id.*
259. 454 N.W.2d 307 (N.D. 1990).
260. 462 N.W.2d 435 (N.D. 1990).

subject matter of a proposed contract of sale, the response must disclose full, accurate and truthful information. There is no inherent theoretical reason why this doctrine must be limited to real property purchases.

However, in *Bourgoius v. Montana Dakota Utilities Co.*,[261] the court refused to extend the doctrine of constructive fraud to situations involving independent businesses dealing at arms length with each other.[262] The court gave no theoretical reason why it refused to extend the doctrine of constructive fraud beyond situations involving real estate sales between individuals.

Nonetheless, the court in *Bourgoius* went on to adopt a new doctrine of fraud regarding commercial situations. *Bourgoius* allowed a finding of actual fraud if there was some negligence.[263] The court reasoned that section 9-03-08 of the North Dakota Century Code, defining actual fraud, allowed fraud to be found if the asserter was negligent in making the assertion.[264] Thus in commercial situations, the assertion of a fact because of negligence is sufficient for the jury to find actual fraud and impose punitive damages on the asserter. There is no inherent theoretical reason why this new North Dakota doctrine of negligent fraud must be limited to commercial construction contracts. It can apply to statements made in product sales.

X. CONCLUSION

Society today is a society concerned about the consumer's use of products, and that those products be safe. These concerns have been reflected in the growing number of cases involving defective products. People who assume that the rise in product litigation is a result of less care in the manufacturing of products are mistaken. The rise in litigation reflects society's concerns. Those concerns have started to shape our products liability law in ways that are far from finished. Until those concerns reach a common consensus and resting place, products liability law will continue to be a complex set of legal rules. This article is intended to be a guide to attorneys trying to sort out those rules.

261. 466 N.W.2d 813 (N.D. 1991).
262. Bourgoius v. Montana Dakota Utilities Co., 466 N.W.2d 813, 819 (N.D. 1991).
263. *Id.* at 818.
264. *Id.*